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### **The Paradox of Visible Illegality: A Brief History of Dutch Migration Control (translated from Dutch by Renée In der Maur)**

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#### ***published in***

Collective Struggle of Refugees. Lost. In Between. Together  
2013

#### ***document version***

Publisher's PDF, also known as Version of record

[Link to publication in VU Research Portal](#)

#### ***citation for published version (APA)***

Stronks, M. C. (2013). The Paradox of Visible Illegality: A Brief History of Dutch Migration Control (translated from Dutch by Renée In der Maur). In J. Staal (Ed.), *Collective Struggle of Refugees. Lost. In Between. Together* (pp. 65-79). BAK.

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# The Paradox of Visible Illegality: A Brief History of Dutch Migration Control

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Martijn Stronks

On 30 November 2012, the Mayor of Amsterdam, Eberhard Van der Laan, gave an order to clear a camp of undocumented asylum seekers on the Notweg in Amsterdam-Osdorp. The reason provided was concerns over health. Following the camp's evacuation, the majority of the immigrants were sent back onto the streets, after which they found shelter in a squatted church. They spent the entire winter in this church in Amsterdam-West. In the spring, however, the mayor once again forced the group to evacuate the building, and they were sent back onto the streets. And yet again they squatted a building in which they stayed for almost half a year. This history keeps repeating itself, as the group was recently evicted one more time. The only consistency in the story seems to be the presence of illegally<sup>1</sup> residing migrants—the government just fails to resolve this problem. How is this possible?

To begin at the beginning, when things were still clear: the law exists only by virtue of there being a distinction between what is legal and what is illegal. This seems self-evident. One cannot grant residency rights to those who are explicitly and already denied those types of rights. At best, an illegal immigrant can try to gain residency through the existing legal framework, but, perhaps paradoxically, his or her very presence as an illegal renders this process especially problematic. The very distinction between legal and illegal is intended precisely to determine access to the admission process of Dutch immigration law: those who are “legal” are juridically present, while those who the law determines fall outside the scope of law are declared legally absent.

1. The author alternates the terms “illegal migrants” and “illegals” in this article with “undocumented migrants,” since the

former terms better emphasize the central tension between *legality* and *illegality* in his article. Eds.

However, reality is often more unruly than the desires of the juridical system. Undocumented immigrants may be lawfully absent, but they are certainly present in reality. Nearing the moment of an impending deportation, some immigrants flee into anonymity. They have, however, not disappeared. Others simply cannot be deported, either because they refuse to cooperate or because their countries of origin do not recognize them as their citizens. Sometimes the country of origin is simply too unsafe or unstable for people to be returned, but this is not a sufficient justification for granting them a residence status in the Netherlands. And according to international human rights treaties, undocumented migrants have rights as well—basic rights, such as the right of access to essential medical assistance, but rights nevertheless.

Illegal immigrants are a thorn in the flesh of a residence admission system. This has, however, not always been the case. Not that long ago, we somehow accepted the fact of the law's inability to fully accommodate social reality. Undocumented migrants were not yet seen as the problematic category par excellence, but rather as a kind of residue formed of the flaws inherent to an admission policy. In previous years, registering oneself as a resident and acquiring a social security number required no permanent or temporary residency permit. Undocumented immigrants were able to work, rent a house, and in some cases even apply for social services, provided they had paid their taxes. Thus, for a long period of time, there was in fact a space left to the illegal immigrant to maneuver within the framework of Dutch law.

During the nineties this changed. In December 1993, Minister of Justice Ernst Hirsch Ballin passed the Law on Identification, which requires everyone in the Netherlands to carry an identification document. Furthermore, in April 1998, succeeding Minister of Justice Winnie Sorgdrager

made sure the *Koppelingswet* [Benefit Entitlement (Residence Status) Act]<sup>2</sup>, which ties access to social security to residency status, came into effect. These laws put things in order. From this moment onwards, illegal immigrants became legally absent, excepting some occasional applicable international human rights. When they did not leave the country, undocumented immigrants disappeared into the margins of society. Finding a job became harder, as did renting a house and participating in sports and recreational activities. Increasingly, one had to submit to identity checks. Illegal immigrants not only became legally absent; they were also made less visible.

Yet they did not leave. Estimates reveal that the number of undocumented immigrants in the Netherlands has not significantly declined since the nineties. Although it is difficult to give exact numbers, because illegality is by its very nature hard to measure, conservative estimates have for years estimated the number of undocumented immigrants in the Netherlands to be between 45,000 and 120,000. Figures on the Dutch return policy likewise reveal that, in practice, only a small minority of illegal immigrants are actually deported, either by being placed on a plane or train to their homeland, or under the assumption and trust that they will leave on their own accord.

Only when a person is forcibly placed on a train or airplane and deported can one state with certainty that this person has in fact left the Netherlands. The vast majority of undocumented immigrants, however, is simply thrown out onto the streets with a notification that they must leave the Netherlands within 48 hours. The Dutch police dub this approach *klinkeren*, which derives from the Dutch word *klinker* [cobblestone] and roughly translates

2. The 1998 *Koppelingswet* [Benefit Entitlement (Residence Status) Act], which literally translates to "Linking Act," prevents

access to health insurance for undocumented immigrants by "linking" the right to healthcare to residency status.

to “cobbling,”—i.e., throwing someone back onto a cobblestone street. In other cases, immigration services can no longer find undocumented immigrants at their home addresses—an “administrative departure” in bureaucratic jargon. Some leave on their own accord, while others opt for the uncertainty of illegality. Thus, even at the beginning of a new millennium, the law still struggles to implement the stark differentiation between absence and presence, despite the measures taken in the nineties.

This inability is nowhere more apparent than in the 1998 introduction of the notion of “individual responsibility,” meaning that the immigrant is personally responsible for his departure. With the implementation of the coalition agreement, State Secretary of Justice Job Cohen decided that the “primary responsibility” for return of the immigrant lays with the immigrant himself. With the introduction of this principle, the law could finally conceal its own failures: when deportation did not in fact succeed in deporting the illegal immigrant, it became his own responsibility. A comparison with criminal law reveals the peculiarity of such a notion of “individual responsibility”: from the perspective of criminal law, it seems to suggest that it is the suspect’s responsibility to act as a collaborator in his own punishment.

This shift in responsibility heralded a new approach. The political desire to actively fight undocumented immigrants and illegality has significantly increased in the Netherlands during the past decade. A new technique has thus been introduced to bring illegal immigrants under closer control of the law: in the wake of enhanced surveillance and widespread identity checks, the state has severely increased the detention of undocumented immigrants. While in 1980 only 45 prison cells were available for the detention of immigrants, by 2006 this number had swelled to 3,945 cells to contain total of 12,480 people. Moreover, the conditions of detention were made extra “austere”; detained immi-

grants spend the majority of their days in barren, dark multiperson cells. Possibilities for recreation are limited to an absolute minimum and unless one is placed in solitary confinement, there is virtually no privacy. In the Netherlands one is worse off in a detention facility for undocumented immigrants than in a criminal detention center. And despite the fact that the measure of detention is legally applicable only so as to enable the deportation of an immigrant, immigrants often end up facing detention for a period of 6 months, and sometimes, even a full 18 months.

Numbers from 2008 reveal that only 20 percent of immigrants who were detained for over 3 months were actually deported by the end of their sentence. After six months of detention, this percentage had dropped to virtually zero. When detention is lifted, migrants are *klinkered*—thrown out onto the streets—with the notification that it is their own responsibility to leave the Netherlands within 48 hours. Former Dutch Minister for Integration and Immigration Rita Verdonk continued to stress this individual responsibility on part of the immigrant, maintaining that “those who are willing to return are able to and should do so.” The blame for illegal residency in the Netherlands is thus exclusively placed on the immigrant—and with each successive encounter with the law, he is once again brought back to detention.

As stated, only in a very small number of cases does detention actually lead to deportation. Although deportation is of course one solution to the problem, the measure of austere detention brings with it another solution: with a knife to his throat, the undocumented immigrant keeps quiet. He complies with the law, avoiding at all costs even the slightest offense—never cycling without the headlights on, always stopping for red traffic lights—in order to stay off the government’s radar. The Law on Identification and the Benefit Entitlement (Residence Status) Act had already

resulted in the juridical absence and social marginalization of immigrants. The widespread use of detention now pushes the undocumented immigrant into complete invisibility, under the threat of his constant precarity. In this fashion, the illegal immigrant is implicitly and continuously brought back under the power of the law. Visibility connotes arrest and detention, and so the illegal immigrant stays invisible, off the radar, for fear of detention or deportation. Thus, immigrants both visible and invisible are subject to the disciplinary power of the law. The law has restored order, or so it seems.

Where, then, does this ongoing desire to criminalize undocumented immigration come from? The two subsequent coalitions of Dutch Prime Minister Mark Rutte (2010–present) have both expressed the wish to bring undocumented immigration and residency under the scope of criminal law, even though this is in fact, through a detour, already a daily practice. By the end of 2012, it seemed as if European Union Law would prevent the criminalization of immigration. Italy was reprimanded by the European Court of Justice for a similar law, which delayed the enforcement of the same law in the Netherlands. However, through a loophole undocumented immigrants in the Netherlands face the same measures. When asylum seekers are currently told to leave the country, they are handed an entry ban, which forbids them from entering Dutch territory for a certain period of time. The trespassing of this ban was criminalized on 31 December 2011, and thus already implicates undocumented immigrants within the scope of criminal law. In light of this one might ask: Why the desire to explicitly and fully criminalize undocumented immigrants even further?

Although the current reading of EU Law seems to leave room for the possibility for such a measure, various objections can be made. Similar to the detention of undocumented immigrants, the monetary costs of criminal

detention are high, with a successful deportation costing around EUR 35,000—a valid argument in a time of economic crisis. Furthermore, every possible connection to deportation—the traditional reaction to the problem of the illegal immigrant—has been lost. Criminal detention does not serve the goal of deportation; rather, it is a means of punishment. Criminalization of the illegal immigrant has a bizarre consequence in that the system, unable to expel him or her, firmly keeps the migrant close to its heart. Paradoxically, the illegal immigrant is detained within the Netherlands precisely because he is not allowed to be in the Netherlands.

All things considered, criminalization adds only one element to the existing regime of detention: a deep stigmatization of the undocumented immigrant. Criminal law functions as the formalized morality of a society: that which is punished is wrong and evil. This goes so far that we already mistrust those who are suspected of a crime, because they are often already publicly condemned before a court has even ruled. Regardless of whether a suspect of a crime has been declared innocent, it is hard to shed the aura of guilt. Criminalization, thus, only serves to deepen the distinction made between the legal and the illegal. The legal citizen is visible and good, and the illegal immigrant is absent, invisible, and evil.

But reality continues to escape the ordering power of the system. Instead of reports about the decline of the “illegal population,” one hears messages from the undocumented immigrants themselves. In Ter Apel, The Hague, and Amsterdam, undocumented immigrants and asylum seekers united in makeshift camps. By escaping the realm of invisibility, they have made themselves publicly heard. Caught in the midst of a legal limbo, with neither access nor exclusion by deportation, they demand a solution for their situation. In one move, they did away with the care-



fully maintained differentiation between visibility and invisibility. With slogans like “No man, no woman, no human being is illegal,” they explicitly agitated against the stigma surrounding undocumented immigrants.

Indeed, visibility is in itself nothing new. From time to time, undocumented immigrants have entered into the limelight and captured the public’s attention. We have witnessed this in past years, for example during the campaign for a “general pardon” in the wake of the tragic fire that occurred in the detention center of Schiphol Airport, in which 11 undocumented immigrants lost their lives.<sup>3</sup> What is new, however, is the fact that the immigrants living in these camps have defied the power of the Dutch government in a markedly public and united fashion. They have explicitly shown that they are not afraid of the government or detention. They know that they cannot be deported, and moreover, one is tempted to think that it is perhaps better to be in a cell than on the cold streets during a harsh Dutch winter.

The responses of the government to the refugee activists are indicative of a derailed system. Secretary of State for Security and Justice Fred Teeven had offered the members of the group one month of shelter on the condition that they would cooperate with their deportation; an offer that he in fact extended to all undocumented immigrants, not just the members of the groups that united in their resistance. Amsterdam Mayor Van der Laan furthermore stated that he’d found 10 municipalities in the Netherlands that are willing to make the same offer. Still, the notion prevails that the immigrant is personally and individually to blame for the impossibility of departure. Mayor Van der Laan proceeded to evacuate the camp due to alleged health and

safety concerns. During the evacuation 108 people were arrested, and 96 of them were immediately released and thrown onto the streets. A few others were released in the following days. Thus, every effort was made to reestablish the distinction between legality and illegality. Following the eviction, the support group of the *Vluchtkerk* [Church of Refuge] stepped in to assist the immigrants, who had been scattered across the city. After members of the squatter movement opened up a church in Amsterdam-West, a group of 130 people eventually found shelter.

A crucial element in this situation is again the notion of “personal responsibility.” Effectively deporting the immigrants escapes the power of the law, yet granting the immigrants legal residency status is stubbornly refused—despite there being in fact juridical ground to grant such status. Dutch law has at hand various means to deal with unexpected and ungraspable situations. The Minister of Integration and Immigration, for example, is granted “discretionary power” which enables the minister to use his own discretion in decisions pertaining to individual cases. The law does not hermetically cover everything; in some cases, a degree of freedom of decision and policy is provided for. One could call this the “refresh function of the law.” Similar to the function of a refresh button on a webpage, law and reality are sometimes in need of realignment. This freedom of discretionary power is, however, never used in cases in which the immigrant does not cooperate with—or to put it more firmly, *frustrates*—his own departure. The notion of personal responsibility thus serves to cover up the reality that the law is unable to deport the immigrant and equally incapable of delineating the existing lawful possibilities for solving this situation.

Here we discover the paradoxical and poignant position of the illegal immigrant. The law itself began problematizing the illegal immigrant in the nineties. It tried to dispose,

3. On the night of 26 October 2005, a fire broke out in the immigration detention center in the east wing of Schiphol Airport in Amsterdam. The fire killed 11 people

and injured 15 others. Many of the surviving detainees stated to the media that the detention guards were slow in responding to their cries for help.

discipline, and stigmatize him. Absence became invisibility, and invisibility became evil. Yet all this time the immigrant stayed; he adapted to the situation, became invisible and evil. It is like squeezing an old balloon—you can squeeze with all your might but the balloon will pop up somewhere else between your fingers. And now, after years of increasingly bold attempts to push the air out of the balloon, the opposite is occurring. Instead of disappearing, the air shoots noisily through the firmly pressing hands of power, leaving the old balloon in an odd shape. The illegals unite, become visible, brave the system, and no longer allow for their exclusion. In response to the camps, municipalities have raised their voices against the symbolic politics of criminalizing illegal immigration and residency. Is it not about time that the system recognizes that reality will always escape its grip? Somebody, please hit the refresh button!

Martijn Stronks (born 1983) studied law and philosophy at the VU University, Amsterdam and University of Cape Town, South Africa and is currently based in Amsterdam, where he is working on a legal and philosophical dissertation on the notion of time in migration law. This is a slightly revised and edited translation of his article which first appeared as “De paradox van de zichtbare illegal: Een kleine geschiedenis van de illegaliteitsbestrijding” in *De Groene Amsterdammer* on 6 December 2012. The text has been translated from Dutch by Renée In der Maur.

